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A User's Guide to Easier Flood Insurance: A Look into the History of Flood Insurance Claims Dispute Processing and Suggestions for Improvement

COURTNEY LAUER*

I. INTRODUCTION

In 2012, Superstorm Sandy alone produced 144,484 claims for federal flood insurance coverage under the National Flood Insurance Program (NFIP).¹² The NFIP was created under the National Flood Insurance Act of 1968,³ and was designed to limit the impact of flooding on both private and public structures.⁴ The NFIP's self-stated goal was to decrease the socioeconomic effects of natural disasters by encouraging the purchase of flood insurance and general risk insurance.⁵

However, after public allegations of structural flaws leading to systematic fraud in the handling of flood insurance claims by the NFIP after Superstorm Sandy, the United States Senate Committee on Banking, Housing, and Urban Affairs created

* B.A. Columbia College 2011, J.D. University of Missouri 2017. I would like to thank the editorial staff of the *Journal of Dispute Resolution* and Professor Robert H. Jerry, II (Isidor Loeb Professor of Law) for the time spent helping edit this Comment. I would also like to thank my family and my friends who have helped edit papers throughout my academic journey and who have helped me become the writer I am today.

1. U.S. SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS MAJORITY STAFF REPORT, ASSESSING AND IMPROVING FLOOD INSURANCE MANAGEMENT AND ACCOUNTABILITY IN THE WAKE OF SUPERSTORM SANDY 2 (2015), http://www.banking.senate.gov/public/_cache/files/336db480-766a-47d7-8e3e-ad9b3409f7ff/6376579CF4596383945557385CB22BAF.flood-report-final-pdf-for-website.pdf.

2. Lately, a high rate of insurance claims is not unusual. In 2005, after Hurricanes Katrina and Rita, policy holders submitted over 165,000 flood insurance claims the NFIP. This amount of claims was "more than the combined number of claims submitted throughout the preceding 35 years of the NFIP's existence." Ernest B. Abbott, *Floods, Flood Insurance, Litigation, Politics – and Catastrophe: The National Flood Insurance Program*, 1 SEA GRANT L. & POL'Y J. 129, 129 (June 2008) available at <http://biotech.law.lsu.edu/climate/sea-grant/Abbott-NFIP-2008.pdf>. However, the majority of these claims were settled without controversy. But thousands of lawsuits were brought by property owners disputing underpaid payouts from insurance companies. Many homeowners realized for the first time that their homeowners insurance did not also cover loss due to floods. *Id.*

3. Gary Knapp, Annotation, *National Flood Insurance Risks and Coverage*, 42 U.S.C.A. § 4001 et seq., 81 A.L.R. Fed 416 § 2 (1987).

4. *The National Flood Insurance Program*, FED. EMERGENCY MGMT. AGENCY (Dec. 10, 2015), <http://www.fema.gov/national-flood-insurance-program>.

5. *Id.*

the Banking Investigative Group⁶ to review concerns over structural flaws within the NFIP as they pertained to underpaying flood insurance claims.⁷

The Banking Investigative Group gave its report to the United States Senate Committee on Banking, Housing, and Urban Affairs on June 22, 2015, and it determined that there were not any incentives found for participating insurance companies to underpay on claims.⁸ Additionally, data from the Federal Emergency Management Agency (FEMA) audit showed low overall rates of payment errors in both private “Write-Your-Own” (WYO)⁹ insurance carriers and “Direct” insurance policies through the program.¹⁰ So why then is there widespread concerns of the NFIP underpaying flood insurance claims?¹¹ The answer lies in the method of dispute

6. Banking Investigative Group consisted of:

- Nine FEMA officials;
- 23 persons representing seven of the so-called Write-Your-Own (WYO) insurance carriers that have been involved in the flood program, which today have 54 percent of the policies in the NFIP and between them handled approximately 57 percent of the NFIP claims arising out of Superstorm Sandy;
- Four persons from a major flood services vendor that works for multiple WYOs;
- Three persons representing the contractor that handles all claims services on the Direct side of the NFIP and is also one of the largest claims service providers on the WYO side;
- Seven officials representing three of the largest national adjuster companies that between them worked on approximately 53 percent of the claims arising out of Sandy;
- Two individuals with extensive experience as independent adjusters, one as an adjuster for a major adjuster firm, and one as a “public” adjuster;
- One experienced flood damage assessment engineer;
- Two persons who work on contract for FEMA as employees of the Bureau and Statistical Agent (BSA);
- Two officials from a company that specializes in training flood claims adjusters for FEMA;
- One contractor who specializes in assisting FEMA with flood-related education and outreach;
- Two staff attorneys at a legal clinic that serves aggrieved NFIP policyholders; and
- Seven officials from various Government Accountability Office (GAO) components responsible for GAO oversight work on the NFIP.

MAJORITY STAFF REPORT OF S. COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS MAJORITY STAFF REPORT, 114TH CONG., ASSESSING AND IMPROVING FLOOD INSURANCE MANAGEMENT AND ACCOUNTABILITY IN THE WAKE OF SUPERSTORM SANDY 9-10 (June 22, 2015) [hereinafter ASSESSING AND IMPROVING FLOOD INSURANCE] available at http://www.banking.senate.gov/public/_cache/files/336db480-766a-47d7-8e3e-ad9b3409f7ff/6376579CF4596383945557385CB22BAF.flood-report-final-pdf-for-website.pdf.

7. *Id.* at 2.

8. *Id.*

9. *Write Your Own Flood Insurance Company List*, FED. EMERGENCY MGMT. AGENCY, http://www.fema.gov/wyo_company (last visited Feb. 21, 2016). Under FEMA’s NFIA, there is an approved list of 79 WYO insurance companies. *Id.*

The WYO Program allows participating property and casualty insurance companies to write and service the Standard Flood Insurance Policy in their own names. The companies receive an expense allowance for policies written and claims processed while the federal government retains responsibility for underwriting losses. The WYO Program operates as part of the NFIP and is subject to its rules and regulations.

What Is The Write Your Own Program?, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/what-write-your-own-program> (last visited Mar. 26, 2016).

10. ASSESSING AND IMPROVING FLOOD INSURANCE, *supra* note 6, at 2.

“NFIP Direct is a program established by FEMA to allow any agency the opportunity to write flood insurance coverage directly with the federal government.” *Introduction to NFIP Direct Servicing Agent*, NATIONAL FLOOD SERVICES, <https://www.nfipservices.com> (last visited Mar. 28, 2016).

11. ASSESSING AND IMPROVING FLOOD INSURANCE, *supra* note 6, at 2.

resolution used to resolve disputed claims. After reviewing the history of the NFIP, the current state of flood insurance claim disputes, and the arbitration methods after claim denials, it is evident the NFIP claim dispute process needs improvement.¹² Additionally, alternative dispute resolution processes used in similar insurance situations—for example, crop insurance—can give insight on reshaping a failing system. Once there is a uniform flood insurance claim dispute process, insureds will have their final claim dispute decisions quicker, and there will be a reduced backlog of claims in our court systems. Additionally, the overall process of claim disputes would be simpler, more streamline, and more understandable by both insureds and insurers.

II. HISTORY OF THE NATIONAL FLOOD INSURANCE PROGRAM

The NFIP was created long before Superstorm Sandy and Hurricane Katrina¹³ through the National Flood Insurance Act of 1968.¹⁴ Its purpose was to make flood insurance more readily available to those who needed it and who could not find it at a reasonable rate through private insurers.¹⁵ The program encouraged homeowners to start to take protective measures.¹⁶ Also, the program was designed to eventually phase out to allow private insurers to sell flood insurance to homeowners at affordable rates.¹⁷

Currently, under the National Flood Insurance Act (NFIA),¹⁸ federal courts have exclusive jurisdiction to hear actions brought under the act.¹⁹ Federal regulation is more prevalent in the flood insurance arena and preempts state laws and remedies because there are more federal statutory and regulatory requirements governing WYO company processes in the sale of flood insurance.²⁰ However, after natural disasters, many lawsuits assert state law causes of action for bad faith claim processing on behalf of the claim representatives and misrepresentation or negligence on behalf of the insurer's agents.²¹ The NFIA does not specify whether federal law preempts state law,²² but the Fifth Circuit Court of Appeals (where states more subject to severe storms, like Louisiana and Mississippi, are located) has addressed the federal preemption issue.²³ In *Spence v. Omaha Indemnity Insurance Company*,²⁴ the circuit court held that federal common law governed the claims

12. Under the Standard Flood Insurance Policy, the dispute process section states: "This policy and all disputes arising from the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968 ... and Federal common law." MILLER'S STANDARD INSURANCE POLICIES ANNOTATED § 09R4 Westlaw (updated 2016).

13. Between 1992 and 2012, the 10 costliest catastrophes in the United States included eight hurricanes or floods. Superstorm Sandy (2012) ranked fourth and Hurricane Katrina (2005) ranked first. INSURANCE INFORMATION INSTITUTE, THE INSURANCE FACT BOOK 2; 144 (2015).

14. Knapp, *supra* note 3, at § 416.

15. *Id.*

16. *Id.*

17. *Id.*

18. 42 U.S.C. § 4072 (2012).

19. Knapp, *supra* note 3, at § 416.

20. Abbott, *supra* note 2, at 154.

21. Robert Redfearn, Jr., *The Paradox of Flood Insurance Coverage*, INS. J. (Mar. 17, 2009), <http://www.insurancejournal.com/news/southcentral/2009/03/17/98791.htm>.

22. Knapp, *supra* note 3, at § 416.

23. Redfearn, *supra* note 21.

24. *Spence v. Omaha Indemnity Ins. Co.*, 996 F.2d 793 (5th Cir. 1993).

under the flood insurance policies, but that the statutes of limitations for misrepresentation claims against WYO companies that issued Standard Form Insurance Policies (SFIP) were governed by state law.²⁵ In 2003, *Richmond Printing, L.L.C. v. Director Federal Emergency Management Agency*²⁶ provided that state law tort claims resulting from claims handled by WYO companies were not preempted by federal law.²⁷ As a result, courts have determined that state law claims arising from issued flood insurance policies are preempted, while claims for the procurement of flood insurance policies are not preempted.²⁸

After Hurricane Andrew hit Florida in 1992, 600,000 insurance claims were filed, with 25,000 claims proceeding to court as disputed.²⁹ However, discussions with FEMA have revealed that there are significant structural inadequacies in the claims dispute process.³⁰ Additionally, FEMA does not require payment to the policyholder even when there is a ruling in favor of the policyholder during the appeals process.³¹ At the conclusion of the current claims dispute process, policyholders become frustrated due to what insurers end up offering coupled with the lack of resolved claims.³² On appeal, when FEMA finds that more money is owed to the policyholder, it does not determine the amount underpaid and instead recommends the claim be reevaluated by the WYO.³³ The standard letter sent from FEMA to the policyholders typically states, “[S]ome issues outlined in your appeal warrant further investigation,” and that “the insurer will inform you . . . of the final disposition of this portion of your claim,” and that there will be “[n]o further administrative review . . . provided in [the] matter.”³⁴

of claimsrance n nature and ng -- d decision,aims. is not the proeprty on of your claim"e policyholders typically states: "ead After the letter is sent to a policyholder, FEMA does not follow up to see if the policyholder's WYO insurance carrier reevaluated the policy.³⁵ FEMA also does not require that the policyholders be paid what the NFIA determined was due to them.³⁶ Additionally, WYOs are not required to pay policyholders after a favorable determination on appeal.³⁷ After the investigation on the structural flaws within the NFIP, the Banking Investigative Group found FEMA's reasoning for the appeals decision process to be "incoherent."³⁸

FEMA agrees that the current appeals decision process "needs to be reevaluated."³⁹ In recognition of the need for change, FEMA is reopening Superstorm

25. *Id.* at 796; Redfearn, *supra* note 21.

26. *Richmond Printing, L.L.C. v. Dir. Fed. Emergency Mgmt. Agency*, 72 Fed. Appx. 92 (5th Cir. 2003).

27. *Id.* at 96; Redfearn, *supra* note 21.

28. *Valerie v. Fidelity & Deposit Co. of Maryland*, 2007 WL 2446100, *3 n.4 (W.D. La. 2007); Redfearn, *supra* note 21.

29. Robert Jerry II, *Dispute Resolution, Insurance and Points of Convergence*, 2015 J. DISP. RESOL. 1, 8 (2015).

30. ASSESSING AND IMPROVING FLOOD INSURANCE, *supra* note 6, at 66.

31. *Id.* at 67.

32. *Id.* at 66.

33. *Id.*

34. *Id.*

35. *Id.*

36. ASSESSING AND IMPROVING FLOOD INSURANCE, *supra* note 6, at 66-67.

37. *Id.* at 67.

38. *Id.*

39. *Id.*

Sandy claims to policyholders in order to pay whatever additional money is found to be owed to claimants.⁴⁰

III. MEDIATION USE IN THE MANAGEMENT OF THE CLAIMS

Post-Superstorm Sandy, the New York State Department of Financial Services created the Storm Sandy Mediation Program which the American Arbitration Association administers.⁴¹ The purpose of the program is to help resolve flood insurance claims involving damage to real or personal property (other than automobiles) that were denied, disputed, or delayed after Superstorm Sandy.⁴² The guidelines of the program permit a claimant or insured to request a mediation conference with his or her insurance company to try to resolve the disputed claim.⁴³ During the process, an independent mediator, with no association with the insurance company or the claimant, conducts the mediation.⁴⁴ Similarly, New Jersey's Department of Banking and Insurance created a voluntary mediation program to help resolve disputes arising from claim denials of homeowners, automobile, and commercial insurance policies after Superstorm Sandy.⁴⁵

Under both of these programs, certain restrictions apply as to what disputed claims may be mediated.⁴⁶ For example, in New Jersey, the disputed claim must total more than \$1,000, and the claim must pertain to insurance that was in effect at the time the storm hit landfall.⁴⁷ In New York, the claim must have occurred in a specified county and the damage must have occurred between a range of dates.⁴⁸ Additionally, both of the programs contain further exclusions.⁴⁹ In New Jersey, the

40. *Id.*

41. *The New York State Storm Sandy Mediation Program Frequently Asked Questions*, AM. ARBITRATION ASS'N 1, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2010402&RevisionSelectionMethod=LatestReleased (last visited Feb. 21, 2016) [hereinafter *N.Y. Sandy Mediation FAQ*].

42. *Id.*

43. *Id.*

44. *Id.*

45. *Storm Sandy Insurance Mediation Program*, N.J. DEP'T OF BANKING & INS. (2011), http://www.state.nj.us/dobi/division_consumers/insurance/sandymediation.html.

46. *Id.* Under the New Jersey system, claims disputed must be totaling over \$1,000. Additionally, the disputed claim must have pertained to insurance in effect at the time the storm hit landfall. Also, the claim could not have been denied or delayed due to suspicion of fraud. *Id.*

Under the New York system, "a claim must involve loss or damage to real property or personal property (except for motor vehicles)." *N.Y. Sandy Mediation FAQ*, *supra* note 41, at 1. This system also includes business interruption claims. Additionally, losses must have occurred in certain counties (Bronx, Kings, Nassau, New York, Orange, Queens, Richmond, Rockland, Suffolk or Westchester). The damage must have been sustained between October 26, 2012 and November 15, 2012, whether or not it was directly related to Storm Sandy. "The claim must have been denied in whole or part by the insurance company; involve a situation where the difference between what the insurance company has offered you to settle the claim and your view as to what the claim is worth is \$1,000 or more; or a situation where the insurance company has not offered to settle with you within 45 days after receiving all the information it requested regarding the claim." *Id.*

47. *Storm Sandy Insurance Mediation Program*, *supra* note 45.

48. *N.Y. Sandy Mediation FAQ*, *supra* note 41, at 1.

49. Under the New Jersey system, claims may be excluded if they are "under policies issued by or through the National Flood Insurance Program are not currently part of the mediation program." *Storm Sandy Insurance Mediation Program*, *supra* note 45.

Under the New York system, claims may be excluded if a person has already (a) "submitted a dispute over property valuation to an appraisal;" (b) "filed suit against the insurance company over the claim;" (c) if "the insurance company has reason to believe a claim is fraudulent, in which case it must report

claim can be excluded if it was part of a policy issued by or through the NFIP.⁵⁰ In New York, a claim can be excluded if the policyholder has previously submitted a dispute over property valuation, or if the claim is under the NFIP.⁵¹ In both, claims arising out of flood insurance coverage denials are not handled through the mediation process.⁵²

After a hurricane or superstorm, many homeowners choose to file claims in court to attempt to recover their losses.⁵³ These claims are rarely successful for the homeowner, in large part because the NFIP can raise defenses available to the federal government.⁵⁴ These defenses include: “sovereign immunity, federal preemption, and a requirement of strict compliance with regulatory requirements.”⁵⁵

The structural strain within the flood insurance claim dispute process highlights the problems that tend to appear when government programs implement rules and regulations to offer commercial services, like flood insurance.⁵⁶ In the years since Hurricanes Katrina and Rita, Congress passed differing pieces of legislation that stress the need for increased training, along with communication, advocacy, and administrative appeal programs.⁵⁷

IV. CURRENT NFIP INSURANCE CLAIM PROCESS

FEMA oversees the NFIP Insurance Claim process by which insured parties can appeal decisions regarding their flood insurance claims.⁵⁸ According to FEMA, the process helps resolve claim issues.⁵⁹ However, FEMA cannot supply additional coverage beyond the claim limits in the NFIP policy.⁶⁰ FEMA demands an insured party must first receive a final determination from his or her insurer and must also receive a written denial of the claim.⁶¹ Once an insured party receives the written denial, then he or she must follow a four-step process to appeal his or her claim: (1) talking to an adjuster regarding the claim; (2) contacting the adjuster’s supervisor; (3) contacting the insurance company’s claim representative; and (4) contacting FEMA.⁶² To contact FEMA, a letter should be written by the insured, or by his or

this to the AAA and the New York State Department of Financial Services;” (d) “Claims under National Flood Insurance Program flood insurance policies;” (e) “Claims against insurers that are not licensed in New York;” (f) “Claims involving motor vehicles;” (g) “Liability claims;” and (h) “Claims under marine insurance policies.” *N.Y. Sandy Mediation FAQ*, *supra* note 41, at 1-2.

50. *Storm Sandy Insurance Mediation Program*, *supra* note 45.

51. *Compare Storm Sandy Insurance Mediation Program*, *supra* note 45, with *N.Y. Sandy Mediation FAQ*, *supra* note 41, at 1-2.

52. *Storm Sandy Insurance Mediation Program*, *supra* note 45; *N.Y. Sandy Mediation FAQ*, *supra* note 41, at 1-2.

53. Abbott, *supra* note 2, at 129.

54. *Id.* at 130.

55. *Id.*

56. *Id.*

57. *Id.*

58. FEDERAL EMERGENCY MANAGEMENT AGENCY, FLOOD INSURANCE CLAIMS HANDBOOK FEMA F-687 8 (Aug. 2014) available at http://www.fema.gov/media-library-data/1409252356253-ee460a21e69333f01eea03a8f55eb3c6/F-687_ClaimsHandbook_508X1_Aug2014.pdf.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

her legal representative, and must be submitted within 60 days after the date of the denial letter.⁶³

Like the individual state programs, FEMA also sets forth limitations on their appeals.⁶⁴ The purpose of FEMA's appeal process is not to increase coverage or policy limits outside the Standard Form Insurance Policy (SFIP); the process's purpose is to resolve claim disputes.⁶⁵ The appeal process is the final administrative review for FEMA.⁶⁶ FEMA requires that if an insured files an appeal on any issue, then that issue can no longer be resolved by appraisal or any other pre-litigation remedies.⁶⁷ Additionally, if an insured files a lawsuit against the insurer on a flood insurance claim issue, then the insured is prohibited from filing an appeal.⁶⁸

After the appeals process is commenced, FEMA reviews the documents and provides a decision in writing to the policyholder and insurer within 90 days of the date of the appeals submission.⁶⁹ If the insured does not agree with the final decision, he or she is directed to his or her policy where information regarding suits against FEMA is provided.⁷⁰ The insured has one year from the date of the initial written denial to file a claim in court.⁷¹ The appeals process does not extend the time.⁷² Furthermore, unless FEMA issued the disputed SFIP directly, FEMA is not the proper party to the lawsuit—even if the decision is appealed.⁷³

Section 4083 of the National Flood Insurance Act of 1968 describes the settlement of claims and arbitration.⁷⁴ The statute explains that the Administrator of FEMA makes the final decision on whether to settle any claims or demands.⁷⁵ The statute mandates that the Administrator of FEMA *may* refer disputes to arbitration with consent of the parties.⁷⁶ Additionally, arbitration is only *advisory* in nature and is only final upon the approval of the Administrator.⁷⁷

63. *Id.* at 9. In the letter, insured should include policy number, name, address, contact information, details of concern, and dates of contact with persons from steps (1) – (3) of the appeals process. *Id.* With the letter insured should include the written denial, relevant policy information for the basis of the appeal, and relevant documentation to support the appeal. *Id.* at 10.

64. FLOOD INSURANCE CLAIMS HANDBOOK, *supra* note 58, at 12.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 13.

70. FLOOD INSURANCE CLAIMS HANDBOOK, *supra* note 58, at 13.

71. *Id.*

72. *Id.*

73. *Id.*

74. 42 U.S.C. § 4083 (2012).

75. *Id.*

(a) The Administrator is authorized to make final settlement of any claims or demands which may arise as a result of any financial transactions which he is authorized to carry out under this subchapter, and may, to assist him in making any such settlement, refer any disputes relating to such claims or demands to arbitration, with the consent of the parties concerned.

(b) Such arbitration shall be advisory in nature, and any award, decision, or recommendation which may be made shall become final only upon the approval of the Administrator.

Id.

76. *Id.*

77. *Id.*

V. EVALUATING METHODS OF ALTERNATIVE DISPUTE RESOLUTION AND DISPUTED CLAIMS

Historically, dispute resolution procedures have been marginalized in considering how best to resolve insurance claim disputes.⁷⁸ However, negotiation, mediation, and arbitration, among other alternative dispute resolution procedures, merit further consideration as effective methods to resolving insurance claim disputes.

A. Negotiation

In the field of insurance law, negotiation was one of the first methods through which claims disputes were resolved.⁷⁹ Almost 50 years ago, Professor H. Laurence Ross observed that negotiation was being used in as many as 95 percent of all automobile claims resulting in personal injury.⁸⁰ For decades, the purpose of using negotiation has been to step outside of and cut down the framework of litigation and “formal lawmaking.”⁸¹ Professor Ross stated that negotiation is cheaper than litigation and better embraces the possibility of compromise, as opposed to a one-party-wins system,⁸² and this remains true in the 21st century.⁸³

However, negotiation, to some people, is seen as more limited in the ultimate resolution of disputes.⁸⁴ In the modern system of flood insurance claim dispute resolution, even where those binding methods, such as arbitration, are employed, FEMA officials have stated they do not require the policyholders to be paid what the appeals process determines is owed to them.⁸⁵

B. Mediation

While mediation is a common dispute resolution method for states to implement after natural disasters, states typically do not include flood insurance claim disputes in these programs, as seen in New York and New Jersey.⁸⁶ Because flood insurance is protected under federal law, the process for seeking a resolution to a flood insurance claim dispute must follow the standards set forth by the federal government, rather than by states or private companies.⁸⁷

Despite the limitations on mediation in flood insurance claim disputes, mediation was seen as an alternative dispute resolution method in the early days of claims

78. JERRY II, *supra* note 29, at 3.

79. *Id.* at 3 n.7.

80. *Id.*

81. *Id.*

82. *Id.*

83. James D. Fullerton, *Non-Litigation Alternatives*, FULLERTON & KNOWLES (2015) <http://www.fullertonlaw.com/construction-law-survival-manual/dispute-resolution-arbitration-and-litigation.html>.

84. John Lande, *My Last Lecture: More Unsolicited Advice for Future and Current Lawyers*, 2015 J. DISP. RESOL. 317, 335.

85. ASSESSING AND IMPROVING FLOOD INSURANCE, *supra* note 6, at 67.

86. N.Y. *Sandy Mediation FAQ*, *supra* note 41; *Storm Sandy Insurance Mediation Program*, *supra* note 45.

87. 42 U.S.C. § 4053 (2012); 42 U.S.C. § 4083 (2012).

resolutions after mass disasters.⁸⁸ Due to the success of a mediation program implemented in Florida after Hurricane Andrew,⁸⁹ Florida created a permanent mediation program for property insurance policy disputes.⁹⁰ Other states chose to adopt similar programs after Florida's success.⁹¹ However, as noted earlier, states that implement mediation programs after natural disasters often exclude disputes stemming from flood insurance claims.⁹²

Overall, mediation is a form of dispute resolution based on voluntary participation, conducted by an impartial mediator who does not issue a binding decision.⁹³ While mediation encourages settlements or agreements between two parties of a dispute, the parties will not always be able to reach an agreement.⁹⁴

C. Arbitration

Like negotiation, arbitration has a long history with insurance law.⁹⁵ Arbitration provisions are becoming more prevalent in modern insurance contracts as well.⁹⁶ Arbitration is a type of dispute resolution where a decision maker issues a binding decision on the insured's claim.⁹⁷ The decision from the arbitrator or panel of arbitrators is final and binding on the parties involved in the claim dispute.⁹⁸ This final and binding decision is what distinguishes arbitration from mediation.⁹⁹

Using arbitration as the method for dispute resolution after natural storms is not a new idea. In 2009, FEMA created an arbitration system for public assistance projects over \$500,000 related to Hurricanes Katrina and Rita.¹⁰⁰ In 2013, FEMA created an arbitration system named the "Dispute Resolution Pilot Program."¹⁰¹ This program allowed claimants to choose to arbitrate their public assistance claims instead of filing a second appeal if their disputes were equal to or exceeded

88. JERRY II, *supra* note 29, at 12. In August of 1992, Hurricane Andrew hit the Florida coast. In the aftermath, more than 600,000 insurance claims were filed and approximately 25,000 of those became a claim dispute. These claims were all sent to the local court system and a backlog immediately became apparent. Due to the large amount of claims, Florida state officials from the Department of Insurance created a mediation program for all disputed claims. Florida had previously used mediation for automobile claims disputes and decided to see how the system would work for the large influx of insurance claims. The program was named "Alternative Procedures for Resolution of Disputed Claims from Hurricane Andrew." *Id.*

89. *Id.* at 14. Approximately a 95 percent success rate for resolving claims. *Id.*

90. *Id.*

91. *Id.* These states include Hawaii, California, Louisiana, Mississippi, New Jersey, New York, and North Carolina. *Id.*

92. *Storm Sandy Insurance Mediation Program*, *supra* note 45; *N.Y. Sandy Mediation FAQ*, *supra* note 41, at 2.

93. Grant Ballard, *Crop Insurance Dispute Arbitration: When is it required, and How Does it Work?*, NAT'L AGRIC. L. CTR. 1, 2 http://nationalaglawcenter.org/wp-content/uploads/assets/articles/ballard_cropinsurancearbitration.pdf (last visited Mar. 13, 2016) [hereinafter *Crop Insurance*].

94. *Id.*

95. JERRY II, *supra* note 29, at 27. Arbitration was prevalent in the seventeenth century with claim disputes arising out of marine insurance contracts. Additionally, in the nineteenth century, marine insurance contracts began incorporating arbitration into policies and other lines of insurance.

96. *Id.* at 28.

97. Ballard, *Crop Insurance*, *supra* note 93, at 1.

98. *Id.*

99. *Id.*

100. JERRY II, *supra* note 29, at 22.

101. *Id.*

\$1,031,000.¹⁰² However, as discussed earlier, FEMA does not always confirm payouts from appeals awards, and some insureds are left without payment from the insurance companies or the federal government.¹⁰³

VI. CROP INSURANCE CLAIM DISPUTE METHOD

The alternative dispute resolution process used in crop insurance claim disputes can give insight to reshaping the NFIP. Crop insurance is very similar to flood insurance during the time period following natural disasters.¹⁰⁴ Crop insurance is the most expensive federal agriculture commodity program in the United States and is one of the most important pillars of domestic agricultural policy.¹⁰⁵ However, crop insurance is a largely overlooked category of insurance.¹⁰⁶

Crop insurance financially protects agricultural producers against crop loss due to natural causes.¹⁰⁷ The federal crop insurance program, created by Congress, was designed to promote national welfare by providing a sound system of crop insurance and allowing research and experience to shape the insurance that is provided.¹⁰⁸ The crop insurance program is authorized by the Federal Crop Insurance Act (FCIA).¹⁰⁹

The crop insurance dispute process begins similarly to the flood insurance dispute process.¹¹⁰ Once farmers experience a loss in their yield, they submit a claim for consideration with the insurance company.¹¹¹ If the claim is denied for recovery, the farmer can then challenge the denial.¹¹² At this point, federal regulations and United States Department of Agriculture (USDA) and Risk Management Agency (RMA) guidelines outline the process for contesting denied claims for crop losses under a federally reinsured crop insurance policy.¹¹³ Farmers can go through a mediation, an arbitration, an appeal, a reconsideration, an administrative review, a judicial review, or a formal lawsuit.¹¹⁴ Like with flood insurance claims, disputes can

102. *Id.*

103. *Storm Sandy Insurance Mediation Program*, *supra* note 45.

104. J. Grant Ballard, *A Practitioner's Guide To The Litigation of Federally Reinsured Crop Insurance Claims*, 17 DRAKE J. AGRI. L. 531, 533 (2013) [hereinafter *A Practitioner's Guide*].

105. JERRY II, *supra* note 29, at 29.

106. *Id.*

107. *Id.* at 97.

108. Ballard, *A Practitioner's Guide*, *supra* note 104, at 533.

109. *Id.*

[T]he majority of crop insurance policies are reinsured by the federal government. The standard crop insurance agreement may appear to be a normal contract between a farmer and an insurance provider, but the USDA, through the Federal Crop Insurance Corporation (FCIC) and the Risk Management Agency (RMA), sets the basic policy terms, conditions, and rates. Crop insurance is further complicated by the fact that there are a wide variety of available policies with distinct terms and conditions. Policies are currently available for over 100 crops and will vary between counties and states. Moreover, in the event of a dispute as to coverage, the federal government may have the authority to make final determinations as to certain provisions and procedures in crop insurance agreements originally entered into between a farmer and an insurance agent.

Id. at 533 (footnotes omitted).

110. *Storm Sandy Insurance Mediation Program*, *supra* note 45; Ballard, *A Practitioner's Guide*, *supra* note 104, at 538.

111. Ballard, *A Practitioner's Guide*, *supra* note 104, at 538.

112. *Id.*

113. *Id.*

114. *Id.* Federal regulations explain the methods available to farmers for denied claim dispute resolution. 7 C.F.R. §457.8 (2014). For example, a mediation is "[a] process in which a trained, impartial,

arise between the insured and the insurer, but the Federal Crop Insurance Corporation's (FCIC) role as a reinsurer can sometimes create a three-way disagreement between all three of the parties.¹¹⁵ Both the private insurer and/or the FCIC can be a part of the reason for a claim denial.¹¹⁶ Depending on which entity denied (fully or partially) the farmer's claim, determines the path the farmer must take to contest the denial.¹¹⁷

Like the SFIP in flood insurance, crop insurance also has a standard form policy—the Common Crop Insurance Policy (CCIP).¹¹⁸ This policy typically includes a mandatory arbitration clause.¹¹⁹ Claims may first be sent to mediation, but if the dispute is not resolved, it must be sent to arbitration.¹²⁰

Additionally, courts have upheld the enforceability of the arbitration provision within the CCIP.¹²¹ Along with the arbitration provision, the Federal Arbitration Act¹²² highly favors arbitration in similar disputes.¹²³ Because of these reasons, arbitration is likely mandatory in *all* crop insurance disputes between insureds and insurers.¹²⁴ Additionally, the arbitration provision of the CCIP prevents insured farmers from bringing suit in a court of law against the insurance provider if the farmer's claim is denied.¹²⁵ The parties in a crop insurance contract are bound by this arbitration requirement.¹²⁶

VII. COMMENT

When deciding between the three different alternative dispute resolution methods and their application to flood insurance claim disputes, arbitration should be the required method. The current arbitration procedures under the NFIP show widespread concerns of underpayment,¹²⁷ but another area of insurance law, specifically crop insurance, has implemented an arbitration method that should be replicated.

Settling for a less formal method of alternative dispute resolution, like negotiation, would be a step backwards for flood insurance claim denial disputes. Additionally, implementing mediation in flood insurance claim dispute cases where the

neutral third party (the mediator), meets with the disputing parties, facilitates discussions, and works with the parties to mutually resolve their disputes, narrow areas of disagreement, and improve communication." 7 C.F.R. § 400.90 (2012). Whereas, a process such as an administrative review happens after an adverse decision and is a review within the Department of Agriculture. *Id.* "Regardless of which method is employed to reach resolution of a crop insurance claim, the Federal Crop Insurance Act, the terms of the common insurance policy, and the relevant federal regulations are binding." Ballard, *A Practitioner's Guide*, *supra* note 104, at 538-39.

115. Ballard, *A Practitioner's Guide*, *supra* note 104, at 538.

116. *Id.*

117. Ballard, *Crop Insurance*, *supra* note 93, at 12.

118. 7 C.F.R. § 457.8.

119. *Id.*

120. JERRY II, *supra* note 29, at 30.

121. Ballard, *Crop Insurance*, *supra* note 93, at 13.

122. 9 U.S.C. §§ 1-15 (2012).

123. Nobles v. Rural Cmty. Ins. Servs., 122 F.Supp. 2d 1290, 1295 (M.D. Ala. 2000).

124. Ballard, *Crop Insurance*, *supra* note 93, at 13.

125. *Id.* at 2.

126. *Id.* at 3.

127. ASSESSING AND IMPROVING FLOOD INSURANCE, *supra* note 6, at 2.

coverage is disputed and the results are not binding would not resolve the problem.¹²⁸

Arbitration is the strongest dispute resolution method for reviewing claim disputes. Not only is there an objective third-party decision-maker, but the results from arbitration are also binding on both parties. Unfortunately, the history of arbitration with flood insurance claim disputes is shapeless. Currently, flood insurance claim disputes may be arbitrated, but the arbitral decision is advisory in nature and left to the Administrator of FEMA to be affirmed.¹²⁹

Not only should arbitration be the method used for claim disputes, but FEMA should adopt a dispute resolution procedure similar to that used in resolving crop insurance disputes. The dispute process would be simpler, more streamline, and more understandable by both insureds and insurers. Adopting the arbitration procedures for flood insurance claims would produce a simpler process for both the flood insurance companies and the insureds. Each party would know what to expect when a dispute arises. Finally, adopting the arbitration process, like crop insurance currently uses, would make the claim dispute process more well known to insurance companies and insureds that frequent the flood insurance market. Disputes are certain to continue between insurers and insureds. Therefore, it is necessary for all parties involved to know the procedures for handling claims as well as the appeals process.

Based upon arbitration's success in the resolution of disputes regarding crop insurance, mandatory arbitration is the best method to practice. Not only is arbitration a form of alternative dispute resolution that will save time and money for all parties, but arbitration also allows parties to say their share without needing to proceed to litigation.

Finally, the resolutions should be binding, and the judgment awards should be paid; therefore, FEMA should use arbitration in order to accomplish these goals. When shelter and livelihood are on the line, insureds should feel confident in knowing they will be paid what they are awarded in the arbitration process.

VIII. CONCLUSION

The structural flaw and widespread concerns of the current dispute process for flood claim disputes could be fixed by utilizing the system used with crop insurance claim disputes. Since states like New Jersey and New York have historically excluded flood insurance claims from mediation programs, having a dispute resolution system in place for times where natural disasters strike would be beneficial for Americans with flood insurance.

In moving forward, the federal government, along with private insurance companies, should analyze and view those methods being used for crop insurance claim disputes—particularly ones that arise after natural disasters. Tropical storms, superstorms, and hurricanes continually effect areas along the coasts.¹³⁰ These storms and disasters, like Hurricane Katrina, leave thousands of Americans without shelter

128. It is possible that negotiation could be beneficial for cases where issues of fact are at question (i.e., how much damage occurred or how much of the damage was caused by the flooding); however, for purposes of this comment, the effect of negotiation in coverage questions is being analyzed.

129. 18 Fed. Proc., L. Ed. § 44:658 (updated Mar. 2016).

130. Storms in North Carolina on July 3-4, 2014 caused surge flooding. *Hurricane Arthur, July 3-4, 2014*, NAT'L WEATHER SERV., <http://www.weather.gov/mhx/Arthur> (last visited Mar. 30, 2016).

and resources.¹³¹ An efficient process to review denied claims must be implemented. Since insurance claims involve the livelihoods of people, the dispute process needs to take place in an efficient and effective manner.

Even though the number of flood insurance claims naturally increase after hurricanes and superstorms, a uniform claim dispute resolution process with mandatory arbitration would help insureds have more timely final determinations and would help reduce backlog in our court systems after those natural disasters.

131. *Hurricane Katrina*, HISTORY, <http://www.history.com/topics/hurricane-katrina> (last visited Mar. 30, 2016). “Hundreds of thousands of people in Louisiana, Mississippi and Alabama were displaced from their homes, and experts estimate that Katrina caused more than \$100 billion in damage.” *Id.*